

The Commission cannot delegate its authority under Section 303(c) of the Act in this manner. Relying on the auction process, instead of the rule making process, generally is an ill-defined licensing scheme.

Furthermore, Congress has admonished the Commission that Section 303(c) of the Act mandates it "to award spectrum by making discrete allocations of spectrum as the public service requires."³¹ By eliminating this step in assigning the bands above 40 GHz, the Commission has omitted a fundamental step in the allocation calculus. It will be foreclosed from conducting a comparative evaluation of the public interest benefits provided by the various types of services that could be allocated in this spectrum. Without making such a comparative public interest analysis among the competing uses of the spectrum, the Commission cannot fulfill its statutory mandate to determine whether its allocation decision will encourage the larger and more effective use of radio in the public interest.

Congress did not give the Commission carte blanche to auction spectrum. Instead, Congress specified clear guidelines for how auctions could be used and when they could be implemented.³² Spectrum allocation and frequency assignment are not among the permitted uses for competitive bidding.³³ In the NPRM, however, the Commission ignores this prohibition and proposes using auctions to allocate spectrum and assign frequencies.

Under Section 309 of the Act, the Commission is prohibited from assigning a band of frequencies for licensed operations "on the expectation of Federal revenues from the use

³¹See S. Rep. No. 301, 99th Cong. 2d Sess. 34 (May 15, 1986) (the Act prohibits the Commission from allowing different services to "compete for the same spectrum...").

³²47 U.S.C. Section 309(j)(6) (1995).

³³47 U.S.C. Section 309(j) (1994).

of a system of competitive bidding"³⁴ Competitive bidding cannot substitute for the Commission's "obligation in the public interest to continue to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means" to assign how specific frequencies are to be used.³⁵ In fact, the legislative history of the statute authorizing competitive bidding, the Omnibus Budget Reconciliation Act of 1993 ("OBRA"), includes a clear message from Congress that "auctions [cannot] be used to allocate frequencies among different service categories" and that "[f]requency allocation decisions must continue to be made by the FCC, not by the private marketplace."³⁶

In OBRA, Congress added Section 309(j) to the Act. This statute authorizes competitive bidding or auctions for various radio services. Under Section 309(j), certain criteria must be met for spectrum to be auctioned:

- applications must be mutually exclusive; and
- the "principal use" of that spectrum must involve, or be reasonably likely to involve, the transmission or reception of communications signals to subscribers for compensation.³⁷

The Commission addressed the issue of auctioning microwave licenses when it established the competitive bidding rules.³⁸ In the Second Report and Order, the Commission concluded that intermediate microwave links and fixed point-to-point microwave are not eligible for auctions. It determined that intermediate links do not meet the criteria

³⁴47 U.S.C. Section 309(j)(7) (1994).

³⁵47 U.S.C. Section 309(j)(6)(E) (1994).

³⁶See 139 Cong. Rec. S. 1438 (daily ed. Feb. 4, 1993) (Statement of Sen. Inouye).

³⁷47 U.S.C. Section 309(j) (1994).

³⁸Second Report and Order, 9 FCC Rcd at 2350-56.

for auction under Section 309(j) of the Act because, due to frequency coordination, mutual exclusivity is quite rare; because an intermediate link cannot and does not transmit communications signals directly; and because significant delays in service provision could result.³⁹ The Commission also found that "the vast majority of use of the fixed point-to-point microwave as a class is for private or internal use by the licensee or its affiliates for which no compensation of any kind is paid."⁴⁰ Consequently, the Commission adopted rules excluding applications for the following services from auction:

- Applications for frequencies used as an intermediate link or links in the provision of a continuous, end-to-end service where no service is provided directly to subscribers over the frequencies. Examples of such intermediate links are: (i) point-to-point microwave facilities used to connect a cellular radio telephone base station with a cellular radio telephone mobile telephone switching office and (ii) point-to-point microwave facilities used as part of the service offering in the provision of telephone exchange or interexchange service.⁴¹
- Private operational fixed services.⁴²

Under the Second Report and Order and Section 1.2102 of the its Rules, it is abundantly clear that the Commission cannot auction spectrum for microwave facilities in the above 40 GHz band.

Auctioning such frequencies also is contrary to public policy. It could delay implementation of service, especially for PCS high capacity short distance radio links. Businesses and public safety users, including police departments, ambulance services, and

³⁹Second Report and Order, 9 FCC Rcd at 2355-56.

⁴⁰Second Report and Order, 9 FCC Rcd at 2354.

⁴¹47 C.F.R. Section 1.2102(b)(4) (1994).

⁴²47 C.F.R. Section 1.2102(c)(12) (1994).

rescue teams, would be unable to access additional spectrum. Their specialized services could not be accommodated by commercial common carriers.

In assuming that the main use of the bands above 40 GHz would be used for short-haul, high bandwidth, revenue generating LMDS-like commercial services, the Commission diminishes the ability of private fixed point-to-point microwave users to secure frequency assignments. Further, by using auctions, the Commission would prevent such private users from influencing the allocation process. Entities planning to use the spectrum for revenue-raising subscription services (as opposed to using the spectrum for their own private operations or for public safety services) are likely to be the highest bidders in any auction. The Commission cannot substitute auctions for its statutory obligation to allocate spectrum in the public interest and cannot prevent private users from owning and controlling their own microwave systems.

SPECTRUM SHARING BETWEEN NON-GOVERNMENT AND GOVERNMENT USERS MUST BE IMPROVED

Lost in the "momentum" to reallocate spectrum, that is subject to non-government and government sharing, is the value of effective spectrum management. Although government users utilize spectrum management techniques, it is critical that all approaches be employed so that spectrum availability can be maximized. The Commission and NTIA must coordinate their activities to more efficiently manage frequency use, promote spectrum management techniques, and permit band sharing. Such coordination should be facilitated

by the fact that the same products used on these bands by private sector licensees are also used by the government.⁴³

One critical ingredient to this improved spectrum management is frequency coordination between government and non-government users. It currently does not work. Private users coordinate among each other in a matter of hours. Private users coordinate with government users over a period of several weeks.

If the shared government and non-government bands above 40 GHz are to be reallocated as proposed in the NPRM, this situation cannot continue. Waiting for government coordination must no longer be a mystery for the private sector. A coordinated effort among NTIA, the Commission, private users, and government users, must be made to improve this situation.

CONCLUSION

The Commission's proposed reallocation of the bands above 40 GHz for LMWS serves the public interest. It will achieve the goals of encouraging innovation, developing new technologies, and increasing export of U.S. telecommunication products.

Yet, with all this newly available spectrum, more can and should be done. Continued emergence of PCS and other technologies will require more fixed point-to-point microwave

⁴³It is possible under the proposals in the NPRM that licensed and unlicensed services would share the same bands. This is not practical. Theoretically, the Commission does not protect unlicensed services. However, experience with earth satellite receivers, used in the 4 GHz band, demonstrates that unlicensed systems do, in fact, enjoy practical Commission protection in case of obvious sharing problems. This policy basically limits the full use of the band by legitimate licensees. Users, which go through the licensing process, should have the full use of their band. Therefore, licensed and unlicensed bands should be kept separate.

spectrum. Existing public safety and emergency service providers, telephone and cellular carriers, businesses and utilities also need more fixed point-to-point microwave spectrum.

These needs can be fulfilled in this proceeding. Spectrum is available in the 48.5 - 58.2 GHz band for fixed point-to-point microwave services. In addition, the 28 GHz band should be allocated for fixed point-to-point use and the 40.5 - 42.5 GHz band should be reallocated for LMDS. Such an allocation replicates international standards, which is critical for ensuring continued and expanded exports of U.S. products. This spectrum can be so allocated with only minor changes to the general proposals in the NPRM.

For the foregoing reasons, TIA strongly urges the Commission to reallocate the 48.5 - 51.4 and 55.2 - 58.2 GHz bands for fixed point-to-point microwave services. TIA requests that the Commission subject these bands to the licensing and technical requirements under Part 101, except for the power and emission limitations imposed herein. Auctions cannot be imposed to issue these licenses. Minor changes to the 47.2 - 48.5 GHz band reallocation

are needed. Coordination between non-government and government users sharing the same bands must be improved.

Respectfully submitted,

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